

FILE COPY

STATE OF WISCONSIN
BEFORE THE DEPARTMENT OF REGULATION AND LICENSING

IN THE MATTER OF THE APPLICATION	:	
FOR A REAL ESTATE SALESPERSON'S	:	FINAL DECISION
LICENSE OF	:	AND ORDER
	:	LS9204214REB
MICHAEL G. CARR,	:	
APPLICANT.	:	

The parties to this proceeding for the purposes of Wis. Stats.,
sec. 227.53 are:

Michael G. Carr
345 W. Doty Street, Apt. #2
Madison, Wisconsin 53703

Department of Regulation and Licensing
P.O. Box 8935
Madison, Wisconsin 53708

Division of Enforcement
Department of Regulation and Licensing
P.O. Box 8935
Madison, Wisconsin 53708

A hearing was held on the above-captioned matter on June 23, 1992. Roger R. Hall, attorney at law, appeared on behalf of the Department of Regulation and Licensing, Division of Enforcement. The applicant, Michael G. Carr appeared in person and by his attorney, Mark A. Eisenberg.

The Administrative Law Judge filed his Proposed Decision in this matter on July 21, 1992. Attorney Roger R. Hall filed Objections to the Proposed Decision on August 3, 1992.

Based upon the entire record herein, the Department of Regulation and Licensing makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Michael G. Carr applied for a real estate salesperson's license on February 24, 1992.

2. Mr. Carr has satisfied the educational requirements to be a real estate salesperson.

3. Mr. Carr has successfully passed both parts of the Wisconsin Real Estate Salesperson Examination.

4. On May 9, 1990 Mr. Carr was convicted in Dane County Circuit Court Branch 4 of one felony count of second-degree sexual assault as a party to a crime, and five felony counts of burglary as a party to a crime. Mr. Carr received the following sentence:

- five years probation on each count, concurrent;
- court costs of \$160;
- restitution of approximately \$4,000;
- one year in county jail, suspendable by probation agent and court after six months; and
- counseling as recommended by probation agent.

5. Mr. Carr has no other criminal or delinquency convictions.

6. The criminal complaints and the judgment of conviction indicate that, after being contacted by police, Mr. Carr cooperated with law enforcement authorities by giving information against his own interest, by resolving his cases by a plea rather than a trial, and by agreeing to testify against a co-defendant.

7. All of the offenses of which Mr. Carr was convicted were committed in the company of another individual who had numerous prior contacts with the criminal justice system and who received a prison term for his part in the same offenses.

8. As a condition of probation, Mr. Carr's was ordered to submit to and comply with any mental health treatment or counseling recommended by his probation agent.

9. Mr. Carr received psychological counseling from the Attic, an organization which contracts with the Department of Correction to provide out-patient treatment to sex offenders. Mr. Carr has completed a 12-week sex offender therapy program at the Attic and has agreed to participate in the Attic's 24-week sex offender therapy program.

CONCLUSIONS OF LAW

I. The Department of Regulation and Licensing has personal jurisdiction over the applicant, based on fact #1 above.

II. The Department of Regulation and Licensing has jurisdiction over the subject-matter of this action, under sec. 452.05 (1)(a) Wis. Stats.

III. The circumstances of the applicant's felony convictions for sexual assault and burglary substantially relate to the practice of a real estate salesperson under sec. 111.335 Wis. Stats.

IV. The applicant failed to show that he is competent under sec. 452.09 (1)(e) Wis. Stats., to transact the business of a real estate salesperson in a manner which safeguards the interest of the public.

ORDER

THEREFORE, IT IS ORDERED that the application of Michael G. Carr for a real estate salesperson's license be, and hereby is, **DENIED**.

EXPLANATION OF VARIANCE

The Department has adopted the Administrative Law Judge's Findings of Fact with the exception of Finding 3 which has been amended and Findings 8 and 9 which have been replaced with two new findings. The judge's proposed Conclusions of Law have been accepted with the exception of proposed Conclusion IV which has also been replaced. The Department has not accepted the judge's recommendation that Mr. Carr be granted a real estate salesperson's license with limitation, but instead has ordered that Mr. Carr's application for licensure be denied. The bases for these variances are set forth herein.

Proposed Finding 3 has been amended to delete the text "demonstrated competency to be a real estate salesperson", because although Mr. Carr has established that he is academically competent to act as a real estate salesperson he has not demonstrated that he is competent to transact the business of a salesperson in a manner which safeguards the interest of the public.

Proposed Findings 8 and 9 have been replaced with additional findings because it has been determined, as discussed later herein, that less weight should be given to the testimony offered by Lawrence Sager and Janet Weber and more emphasis should be placed upon evidence contained in the record which more directly relate to Mr. Carr's rehabilitative efforts.

Proposed Conclusions of Law IV has been omitted because it has been determined, as discussed later herein, that additional factual evidence does not form a basis under s. 227.01 (3)(a) Stats., for granting Mr. Carr a limited license. The new text contained in Conclusion IV has been taken from proposed Conclusion III. The items have been separated to make it clear that a determination has been made regarding each of the standards contained in the statutes.

The Department of Regulation and Licensing is authorized under s. 452.05 (1)(a) Wis. Stats., to grant and issue licenses to real estate salespersons. Sections 452.03 and 452.09 (1)(e) Stats., require an applicant for a salesperson's license to submit proof satisfactory to the Department of the person's competence to transact business in a manner which safeguards the interest of the public. Section 452.03 Wis. Stats., states in part:

Brokers and salespersons licensed. No person may engage in or follow the business or occupation of, or advertise or hold himself or herself out as, or act temporarily or otherwise as a broker or salesperson without a license. Licenses shall be granted only to persons who are competent to transact such businesses in a manner which safeguards the interest of the public, and only after satisfactory proof of the person's competence has been presented to the department.

Section 452.09 (1)(e) Wis. Stats., reads:

(1) FORM OF APPLICATION. Any person desiring to act as a broker or salesperson shall submit to the department an application for a license. The application shall be in such form as the department prescribes and shall include the following:

(e) any other information which the department may reasonably require to enable it to determine the competency of each applicant, including each member of the partnership, or each officer of the corporation, to transact the business of a broker or salesperson in a manner which safeguards the interest of the public.

Mr. Carr has failed to provide satisfactory proof to the Department that he is competent to transact the business of a salesperson in a manner which safeguards the interest of the public as required under ss. 452.03 and 452.09 (1)(e) Stats.

Mr. Carr was convicted in 1990 of one felony count of second-degree sexual assault as a party to a crime and five felony counts of burglary as a party to crime. He was sentenced to serve one year in jail, ordered to serve five years on probation and ordered to pay restitution and court costs. As a condition of probation, Mr. Carr was ordered to submit to and comply with any mental health treatment or counseling recommended by his probation agent.

Mr. Carr presented evidence at the hearing relating to his rehabilitative efforts in the form of testimony provided by Lawrence Sager, his former instructor at Madison Area Technical College and Janet Weber, his probation agent. The Administrative Law Judge gave significant weight to the testimony of Mr. Sager and Ms. Weber, as evidenced in his proposed Findings of Fact 8 and 9, proposed Conclusions of Law IV and his order recommending the issuance of a limited license. The Department has concluded that less weight should be given to Sager and Weber's testimony because of their lack of qualifications to render opinions relating to the success of Mr. Carr's rehabilitative efforts. The judge's proposed Findings of Fact 8 and 9 and Conclusions of Law IV read as follows:

8. Mr. Carr attended classes at M.A.T.C. taught by Mr. Sager an exceptionally well-qualified real estate professional and teacher, and in Mr. Sager's opinion, Mr. Carr would likely be a credit to the real estate profession.

9. Mr. Carr's probation is assigned to Janet Weber, a well qualified probation agent. In Ms. Weber's opinion Mr. Carr has responded exceptionally well to rehabilitation efforts and the risk of Mr. Carr reoffending is relatively low. Ms. Weber is willing to impose additional conditions of probation on Mr. Carr and to monitor his contacts and activities if he is granted a real estate salesperson's license.

IV. Conclusion III notwithstanding, the additional factual evidence presented at the hearing forms a sufficient basis under s. 227.01 (3)(a) Wis. Stats. for granting the applicant a limited license as a real estate salesperson.

It is clear from reading the judge's proposed Findings of Fact 8 and 9 and Conclusions of Law IV that the his proposed order granting Mr. Carr a limited license is based primarily upon the testimony of Mr. Sager and Ms. Weber. While there is no question that Mr. Sager and Ms. Weber are well-qualified in their respective fields, the evidence does not establish that they are qualified to render opinions regarding Mr. Carr's rehabilitation in terms of the success of treatment measures or in terms of whether he is likely to engage in repetitive criminal behavior. Neither Mr. Sager nor Ms. Weber possess the appropriate education, training or experience required to properly assess or treat individuals who engage in the type of behavior exhibited by Mr. Carr at the time he committed the criminal offenses which led to his conviction.

Mr. Sager testified that he has been the lead instructor in the real estate program at Madison Area Technical College (M.A.T.C.) for at least 22 years. He taught a class which Mr. Carr attended between August, 1991 and December, 1991. He is described by the judge as being "exceptionally well-qualified in the area of real estate". (Tr. p. 8, 12; FF. #8).

Mr. Sager testified that in his opinion, Carr would be "a credit to the real estate profession"; that on the basis of Carr's performance in the classroom and the manner in which he related to other students, "he got along beautifully with the people in class"; that Carr is a "gentleman", a "solid person", a "smart young man" and a "good person"; that he has a "tremendous attitude"; that he has shown a "tremendous amount of character" and that he is a "young man that's trying to straighten himself out in life". (Tr. p.10-11).

Mr. Sager's opinion is more in the nature of character evidence rather than an opinion offered to establish the success of Mr. Carr's rehabilitative efforts. In fact prior to rendering his opinion at the hearing, Sager did not know that Carr had been convicted of being a party to the crime of second-degree sexual assault and he learned while testifying at the hearing that Carr had been convicted of burglary. It is apparent that at the time Sager rendered his opinion he lacked relevant information relating to the specific criminal behavior which resulted in Carr's conviction.

Ms. Weber testified that she has been employed as a probation and parole agent with the Department of Corrections, Division of Probation and Parole, for approximately four years. Her duties include supervising offenders in the community; making home and office visits; making and monitoring treatment referrals; monitoring employment; writing presentences and making court appearances. She testified that since January 1991, she has supervised sex offenders in the community as part of a two-person unit where all of the clients are sex offenders. She has a Bachelors Degree in Education and is certified to teach learning disabled, mentally retarded and emotionally disturbed children. Ms. Weber also has a Masters Degree in Social Work. She is described by the Administrative Law Judge as being a "well-qualified probation agent". (Tran. p.22-23, 25; Finding of Fact 9).

Ms. Weber stated that she has supervised Mr. Carr for approximately one year and that as a condition of probation, Mr. Carr is required to obtain "drug and alcohol counseling and counseling for sex -- and psychosexual counseling". She testified that Carr has successfully completed a 12-week program for sex offenders administered by the Attic, a non-profit organization which contracts with the Department of Corrections to provide out-patient treatment to sex offenders, and that Carr is scheduled to participate in a 24-week sex offender therapy program. She stated that Carr has three more years to serve before being released from probation, and that in general the Department of Corrections does not discharge sex offenders before completion of their probation period.

In reference to the likelihood of Mr. Carr engaging in further criminal activities, Ms. Weber stated:

Mr. Carr, in my opinion, although I'm not a psychiatrist, is not psychotic and does not have such poor impulse control that he would be likely to engage in sexual offenses with so many safeguards. People would know where he was. People would know whom he was seeing and could be so easily tracked that -- predicting behavior is dangerous -- is dangerous business. I can't say what Michael Carr is going to do. None of us can say that except Mr. Carr. What I can say and I'm willing to say is I think that he is doing everything possible that he can do reduce his dangerousness in the community and has expressed to me a willingness within the context of the work situation to provide the employer with documentation of his whereabouts and activities that would reduce the likelihood that he would be able to do anything that would be improper.

Ms. Weber further stated that:

I can't predict what it is that he's going to do. I cannot say with certainty this man will not reoffend. There isn't anybody who could say that. Not even treatment providers who are in the business of -- of providing behavioral treatment of which Mr. Carr is participating in.

Finally, Ms. Weber testified in reference to whether she had an opinion to a reasonable degree of professional certainty as to whether Mr. Carr is competent to transact the real estate business in a manner which safeguards the interests of the public, that:

I think he -- that he does. My -- I have no concern particularly about his fiduciary responsibility. I think that in his present position at Taco Bell he handles money. Certainly not of the same kind of money that -- that he would in -- in contact -- in dealing with real estate. I would have a much greater concern about that had Mr. Carr been convicted of forgery, embezzlement or any other kind of white collar crime involving misappropriation of funds. And he does not have that kind of record.

It is clear from the evidence that Ms. Weber is knowledgeable about the specific behavior which resulted in Mr. Carr's criminal conviction and she has personal knowledge of facts relating to his rehabilitative efforts; however, the evidence does not establish that she is qualified to render a professional opinion regarding Mr. Carr's psychological counseling or the success of any treatment measures.

Aside from the testimony provided by Ms. Weber, the record does not contain any evidence relating to the 12-week sex offender therapy program which Mr. Carr completed or relating to the 24-week sex offender program which he agreed to participate in at the Attic. Carr's acceptance into the 24-week therapy program raises questions regarding the success of the 12-week therapy program. In the absence of specific relevant evidence relating to the success of Mr. Carr's treatment, in the form of health care records and/or testimony offered by qualified professionals, it cannot be concluded that Mr. Carr has been successfully rehabilitated.

In addition to considering Mr. Carr's application under the applicable provisions of ch. 452 Stats., the Administrative Law Judge also considered the application under the provisions contained in s. 111.335 Stats. Based upon a review of the criminal complaints and informations filed by the District Attorney's office relating to Mr. Carr's criminal conduct and the applicable criminal statutes, it can be concluded that the circumstances of Mr. Carr's felony convictions for sexual assault and burglary substantially relate to practice as a real estate salesperson (Conclusions of Law III; Ex. #1).

In analyzing the "circumstances of the offenses" for which a person is convicted, the Wisconsin Supreme Court stated in County of Milwaukee v. Labor and Industry Review Commission, 139 Wis. 2d 805, 824; 407 N.W.2d 908 (1987), that a proper inquiry into the circumstances of the offenses for which a person is convicted should focus on whether the tendencies and inclinations to behave a certain way in a particular context are likely to reappear later in a related context, based upon the traits revealed. The Court further stated that it is "the circumstances which foster criminal activity that are important, e.g., the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person" which are relevant in a proper "circumstances inquiry".

In this case, the evidence presented by Mr. Carr is not sufficient to establish that he has been successfully rehabilitated or that it is unlikely he will engage in repetitive criminal behavior. What is clear from the evidence is that if Mr. Carr is granted a limited license he will have ample opportunity to engage in criminal behavior. Not only would he be presented with opportunities to make frequent, unsupervised one-on-one contacts with homeowners and prospective buyers, he would also have access to and be entrusted with handling trust funds on a regular basis. Absent satisfactory evidence of successful rehabilitation, the Department cannot provide assurance to the public that Mr. Carr will not engage in repetitive criminal behavior, or that he will transact business as a salesperson in a manner which safeguards the interest of the public.

Dated this 17th day of September, 1992.

WISCONSIN DEPARTMENT OF REGULATION AND LICENSING

By: Maureen A. [Signature]

STATE OF WISCONSIN
BEFORE THE DEPARTMENT OF REGULATION AND LICENSING

IN THE MATTER OF THE APPLICATION
FOR A REAL ESTATE SALESPERSON'S
LICENSE OF

MICHAEL G. CARR,
APPLICANT.

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:
:
NOTICE OF FILING
PROPOSED DECISION
LS9204214REB

TO: Mark A. Eisenberg, Attorney
121 E. Wilson Street
P.O. Box 1069
Madison, WI 53701
Certified P 568 982 396

Roger R. Hall, Attorney
Department of Regulation and Licensing
Division of Enforcement
P.O. Box 8935
Madison, WI 53708

PLEASE TAKE NOTICE that a Proposed Decision in the above-captioned matter has been filed with the Department of Regulation and Licensing by the Administrative Law Judge, John N. Schweitzer. A copy of the Proposed Decision is attached hereto.

If you have objections to the Proposed Decision, you may file your objections in writing, briefly stating the reasons, authorities, and supporting arguments for each objection. Your objections and argument must be received at the office of the Bureau of Direct Licensing and Real Estate, Department of Regulation and Licensing, Room 281, 1400 East Washington Avenue, P.O. Box 8935, Madison, Wisconsin 53708, on or before August 10, 1992. You must also provide a copy of your objections and argument to all other parties by the same date.

You may also file a written response to any objections to the Proposed Decision. Your response must be received at the office of the Bureau of Direct Licensing and Real Estate no later than seven (7) days after receipt of the objections. You must also provide a copy of your response to all other parties by the same date.

The attached Proposed Decision is the Administrative Law Judge's recommendation in this case and the Order included in the Proposed Decision is not binding upon you. After reviewing the Proposed Decision, together with any objections and arguments filed, the Department of Regulation and Licensing will issue a binding Final Decision and Order.

Dated at Madison, Wisconsin this 21st day of July, 1992.


John N. Schweitzer
Administrative Law Judge

STATE OF WISCONSIN
BEFORE THE DEPARTMENT OF REGULATION AND LICENSING

IN THE MATTER OF THE APPLICATION	:	
FOR A REAL ESTATE SALESPERSON'S	:	PROPOSED DECISION
LICENSE OF	:	Case No. LS-9204214-REB
MICHAEL G. CARR,	:	(DOE case number 92 REB 106)
APPLICANT.	:	

PARTIES

The parties in this matter under sec. 227.44, Wis. Stats. and sec. RL 2.036, Wis. Adm. Code, and for purposes of review under sec. 227.53, Wis. Stats. are:

Michael G. Carr
4315 Monona Drive
Madison, WI 53716

Department of Regulation and Licensing
1400 East Washington Ave.
Madison, WI 53708

Division of Enforcement
Department of Regulation and Licensing
P.O. Box 8935
Madison, WI 53708

PROCEDURAL HISTORY

A. On February 24, 1992 Michael G. Carr filed an application for a real estate salesperson's license. On March 23, 1992 the Department of Regulation and Licensing denied Mr. Carr's request, stating

The Department is charged with the duty of protecting the public from incompetent licensees. "Incompetent" is broadly defined to include dishonesty, theft, fraud and behavior of a criminal nature. Applicant Carr is well within that definition of "incompetent" by his conduct. The purpose of the real estate licensing laws is to protect the public welfare by regulating persons who practice real estate in order to offer assurance that persons practicing real estate will not act in a manner adverse to their clients or to society in general. Conviction of applicant Carr for the crimes as stated above substantially relate to the duties of a real estate salesperson under Chapter 452, Stats., and applicant Carr is, therefore, ineligible for a real estate salesperson's license.

B. On April 7, 1992, Mr. Carr by his attorney Mark Eisenberg, 121 E. Wilson St., Madison, WI 53701, filed a Notice of Appeal and Request for Hearing. Mr. Carr's request was granted, under sec. RL 1.05(2)(a), and a hearing was scheduled for June 23, 1992. Notice of Hearing was mailed by the Division of Enforcement on April 21, 1992 and received by Mr. Carr on April 27, 1992. The question to be decided at the hearing was stated as:

Did the Department err in concluding that you were incompetent pursuant to secs. 452.08 and 452.09(1)(e), Wis. Stats., to transact the business of a real estate salesperson in a manner which safeguards the interests of the public?

C. All time limits and notice and service requirements having been met, the hearing was held as scheduled on June 23, 1992. Mr. Carr appeared in person and represented by Attorney Eisenberg. The Real Estate Board was represented by Attorney Roger Hall of the Department's Division of Enforcement. The hearing was recorded, and a transcript of the hearing was prepared and delivered on July 15, 1992. The testimony and exhibits entered into evidence at the hearing form the basis for this Proposed Decision.

FINDINGS OF FACT

1. Michael G. Carr applied for a real estate salesperson's license on February 24, 1992.
2. Mr. Carr has satisfied the educational requirements to be a real estate salesperson.
3. Mr. Carr has demonstrated competency to be a real estate salesperson by successfully passing both parts of the Wisconsin Real Estate Salesperson Examination.
4. On May 9, 1990 Mr. Carr was convicted in Dane County Circuit Court Branch 4 of one felony count of second-degree sexual assault as a party to a crime, and five felony counts of burglary as a party to a crime. Mr. Carr received the following sentence:
 - five years probation on each count, concurrent;
 - court costs of \$160;
 - restitution of approximately \$4,000;
 - one year in county jail, suspendable by probation agent and court after six months; and
 - counseling as recommended by probation agent.
5. Mr. Carr has no other criminal or delinquency convictions.
6. The criminal complaints and the judgment of conviction indicate that, after being contacted by police, Mr. Carr cooperated with law enforcement authorities by giving information against his own interest, by resolving his cases by a plea rather than a trial, and by agreeing to testify against a co-defendant.

7. All of the offenses of which Mr. Carr was convicted were committed in the company of another individual who had numerous prior contacts with the criminal justice system and who received a prison term for his part in the same offenses.

8. Mr. Carr attended classes at M.A.T.C. taught by Lawrence Sager, an exceptionally well-qualified real estate professional and teacher, and in Mr. Sager's opinion, Mr. Carr would likely be a credit to the real estate profession.

9. Mr. Carr's probation is assigned to Janet Weber, a well-qualified probation agent. In Ms. Weber's opinion Mr. Carr has responded exceptionally well to rehabilitation efforts and the risk of Mr. Carr reoffending is relatively low. Ms. Weber is willing to impose additional conditions of probation on Mr. Carr and to monitor his contacts and activities if he is granted a real estate salesperson's license.

CONCLUSIONS OF LAW

I. The Department of Regulation and Licensing has personal jurisdiction over the applicant, based on fact #1 above.

II. The Department of Regulation and Licensing has jurisdiction over the subject-matter of this action, under sec. 452.05(1)(a), Wis. Stats.

III. The circumstances of the applicant's felony convictions for sexual assault and burglary substantially relate to the practice of a real estate salesperson under sec. 111.335, Wis. Stats., and the applicant failed to show that the Department of Regulation and Licensing erred in concluding that he was incompetent under sec. 452.09(1)(e), Wis. Stats. to transact the business of a real estate salesperson in a manner which safeguards the interests of the public.

IV. Conclusion III notwithstanding, the additional factual evidence presented at the hearing forms a sufficient basis under sec. 227.01(3)(a), Wis. Stats. for granting the applicant a limited license as a real estate salesperson.

ORDER

THEREFORE, IT IS ORDERED that the application of Michael G. Carr be granted, and that he be issued a real estate salesperson's license with the following limitations:

(a) For as long as he remains on probation to the Department of Corrections he shall provide written reports to his probation agent, the details, timing and format of which shall be determined by the probation agent, both

(1) before any scheduled interviews, showings or other business contacts, and

(2) after all such contacts, whether scheduled or unscheduled.

(b) For as long as he remains on probation to the Department of Corrections he shall be responsible for seeing that his probation agent supply to the Real Estate Board on a quarterly basis a written report regarding his compliance with this order. His probation agent is also hereby requested to report immediately to the Real Estate Board any violation of any of the rules or conditions of Mr. Carr's probation.

(c) For as long as he remains on probation to the Department of Corrections any failure by Mr. Carr to comply with this order or any other condition of probation imposed by his probation agent, or any failure to accurately and completely list all his business contacts, shall be grounds for summary suspension of his salesperson's license by the Real Estate Board.

If Mr. Carr complies completely with the above limitations for eighteen months, he may petition the Department for an unlimited license. The Department in its discretion may then deny the petition and continue Mr. Carr's license as limited above, it may modify the limitations on Mr. Carr's license, or it may issue him a license without limitations. Denial in whole or part of a petition under this paragraph shall not constitute denial of a license and shall not give rise to a right to a hearing under secs. 227.01(3) and 227.42, Wis. Stats.

OPINION

Review of the Department's Decision

Under sec. 227.01(3)(a) the Department acts with substantial discretionary authority in its decision to grant or deny a license. Therefore, if an applicant challenges that action, he or she bears the burden of showing that the Board's action was an abuse of discretion, i.e. that the Department either (1) failed fairly to consider the evidence before it, or (2) misapplied the statutes and rules and case law which should govern its decision. Sexual assault and burglary are so clearly related to the activities of real estate salespersons that there is no issue of the Department acting within its authority when it denied Mr. Carr's application.

Sec. 111.321, Wis. Stats. generally prohibits employment discrimination (defined in sec. 111.322 to include refusing to license an individual) on the basis of conviction record, but sec. 111.335 says "notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ or license ... any individual who: 1. has been convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the particular job or licensed activity ..." (emphasis added).

In Gibson v. Transp. Comm., 106 Wis.2d 22, 315 N.W.2d 346 (1982) and County of Milwaukee v. LIRC, 139 Wis.2d 805, 407 N.W.2d 908 (1987) the Wisconsin Supreme Court ruled that in an employment decision, an agency need not inquire into the specific facts of a conviction where the "circumstances of the crime itself" are substantially related to the type of employment. In essence, these cases say that an employer or a licensing agency is not required to undertake a full-blown factual hearing before making an employment or licensing decision. In Mr. Carr's case, Not only are rape and burglary repellent in their own right, but his convictions were for crimes against both person and property. Because a real estate salesperson routinely has access to unoccupied dwellings and routinely has contact with individuals in unsupervised settings, the Department properly decided that the circumstances of sexual assault and burglary substantially relate to licensure as a real estate salesperson, and the decision to deny his application was proper.

Additional Evidence

However, an employer or licensing authority is not prevented by statute or rule from looking beyond the circumstances of an offense, nor is it required to discriminate against persons who have been convicted of offenses which are substantially related to a type of employment. In fact, class 1 hearings (required for state agencies by sec. 227.01(3), Wis. Stats.) provide precisely what the Supreme Court says is not required under sec. 111.335 alone, an opportunity for the applicant to supplement the information originally provided in the application by other relevant evidence, including any facts related to a criminal conviction. After such a hearing, even though the agency's original decision may be unassailable, the administrative law judge may propose a decision and order which differs from the initial decision, if it is justified by the facts presented in the hearing.

The hearing in this case afforded Mr. Carr the opportunity to present evidence of his rehabilitation. Although Mr. Carr might well have attempted to minimize the original offenses of which he was convicted or his participation in them, especially since he was convicted as party to a crime,¹ he made no attempt to do so. Instead, he presented evidence related to his rehabilitation since conviction through two witnesses, Lawrence Sager and Janet Weber, and his record in that regard provides a sufficient basis for the Department in its discretion to consider this an exceptional case and to grant a limited license to Mr. Carr.

¹Witness Janet Weber made a positive reference at one point in her testimony to the role played by Mr. Carr in the sexual assault: "had it not been for the intervention of Mr. Carr, that Mr. -- the Messrs. Hilton would have killed the young woman involved in the sexual assault" (transcript, p. 26). Although no objection was made, her comment is clearly hearsay and is simply too unreliable to form a basis for this decision. Nevertheless, having made my decision without directly factoring in that comment, I find it provides useful confirmation of the character contrast between Mr. Carr and the other individuals with whom he committed his crimes.

Lawrence Sager is exceptionally well-qualified in the area of real estate. Among other things, he is the lead instructor in the real estate program at Madison Area Technical College (M.A.T.C.). His opinion about Mr. Carr comes from having taught Mr. Carr in real estate classes at M.A.T.C. Mr. Sager says that he has had other students who have been convicted of criminal offenses, and that he is able to contrast Mr. Carr to them. His opinion of some convicted criminals is "even though they had gone through all this and paid their dues that they were still immature, didn't have real positive attitudes and I really questioned their ability to be in the real estate business" (transcript, pp. 9-10). His opinion of Mr. Carr is as follows (transcript, pp. 10-11):

I think that Mike has, on the basis of his performance in the classroom and the manner in which he has related to the students -- he got along beautifully with the people in the class. I never saw any indications that he was not a good person, a solid person. And he was just a gentleman. And he's a smart young man. And he -- I think he has a tremendous attitude. ... I feel that he has shown a tremendous amount of character. And he's a young man that's trying to straighten himself out in life.

Janet Weber is a probation and parole agent with the Department of Corrections. She is also a certified social worker, and one of two probation agents who specializes in supervising sex offenders. She has supervised Mr. Carr in his probation for the past year, and she is in a position to contrast Mr. Carr to other individuals who have been convicted of crimes, especially sexual assault offenses. Her opinion of Mr. Carr, expressed at length in the hearing (transcript, pp. 28-51) is reflected in this excerpt (transcript, pp. 30-31):

I'm here because I believe that Mr. Carr is doing a great deal to monitor his own behavior. He's been exceptionally compliant with all the treatment rules and recommendations. He has complied with every condition of -- of supervision that I asked of him. And more importantly, he's gone above that with regard to reporting information to me. He attends all his appointments. He is present for home visits. He reports all police contact. He reports all police contact that may -- that I may or may not want to know about. He has informed his employers of his probationary status. He's paying his restitution. He's attending treatment. He's volunteering to do extra things for treatment. He's informed his -- his teachers with respect to this education about his sexual offenses and has pursued his real estate license despite the fact that we talked about this may be a difficult process for him, and he was willing and did inform his teachers, as is evident by the testimony given earlier in this hearing. Most offenders don't do that. Most offenders don't want to do that. Most offenders want to be obstructionists and feel

-- and have an attitude of entitlement about what it is that they deserve, as well as most offenders are in denial, which tends to add to their attitude of entitlement. ... (Mr. Carr) is not in denial. He is well aware of his dangerousness. He is, in my opinion, doing everything that he can to reduce his dangerousness in the community and is willing, as I understand, to -- in applying for a sales license rather than a broker's license, showing that -- that he understands that he has limitations in the community. Most sex offenders in his position would have applied for a broker's license, even though that would be less than appropriate in this case.

Further, Ms. Weber stated that she has no concern over his being able to fulfill the fiduciary responsibilities of a real estate salesperson (transcript, p. 34), and that she is not concerned over his having unsupervised contact with females (transcript, pp. 32-33). Finally, Ms. Weber made an important point by relating this denial proceeding to Mr. Carr's own rehabilitation (transcript, pp. 47-48):

(Granting Mr. Carr a salesperson's license) would have positive benefits in terms of reoffender habilitation, self -- self-esteem. He would be able -- he'd be making better money so he would be able to pay his restitution. That would have benefit to the community directly. He would have an increased self-esteem and -- and see the payoff of delayed gratification, of learning, of going to school, working and then seeing that one's life can eventually turn around. It would be, I think, a tremendous disappointment to him at this point in more ways than one in that he's really worked step by step by step to do this, and if he was unable to do it, I think it would really be a setback for him in -- in terms of -- this is tricky. I don't -- I don't feel at all that if Michael doesn't get this license he's going to be angry and he's going to go out and reoffend or do something or that he's, you know, his life is going to fall apart. But so often we require of offenders that they do certain things with the promise that their life will be better for them if they do this -- this -- this treatment or whatever, and it seems that this is a case where -- where we're in a position to do this, to say: We have some concerns about your behavior but you're rehabilitating yourself. And so you have a chance to prove that steady work, appropriate social behavior, participation in treatment pays off because now people are willing to trust you in the community and give you a chance.

Mr. Carr also testified in his own behalf (transcript, pp. 52-57), and although he was nervous, he presented himself well and testified credibly. The hearing was videotaped, and anyone who doubts the reasoning of this decision is encouraged to view Mr. Carr's testimony before forming an opinion. Mr. Carr stated that he is working and making small but regular payments on his court-ordered restitution, that he has learned from his mistakes, and that he has gone to school to reestablish himself and regain trust.

Although this is not a disciplinary case, the purposes of professional discipline as set forth by the Wisconsin Supreme Court² may be instructive. Those purposes are (1) to protect the public, by assuring the moral fitness and professional competency of those privileged to hold licenses, (2) to rehabilitate the offender, and (3) to deter others in the profession from similar unprofessional conduct. Imposing punishment is not an appropriate purpose of discipline.

In this case, Mr. Carr is qualified in every way as an applicant except for the fact of his conviction. The purpose of a license denial in such a situation should only be protection of the public. It should not be to impose additional punishment on an individual who has "paid for" (or is at least in the process of paying for) his past actions, nor would it be particularly effective (with such serious offenses as these) in deterring others in the profession from similar actions. With regard to the offender's rehabilitation, Janet Weber testified that Mr. Carr at his present stage would be best served by granting, not denying, the requested license.

If Mr. Carr's application is approved, it is possible that he will become an exemplary real estate professional, in which case the public's interest would actually be promoted by granting him a license, but at this stage those interests must still be viewed as being in opposition. The decision requires a balancing of, on the one hand, a fair and just consideration of Mr. Carr's interest in being granted access to a regulated profession, and on the other, the interest of the public (and the profession) in being protected from an individual who has violated both person and property in the past. In a sense, any decision by a credentialing authority to license an applicant is a statement to the public that the applicant is competent and trustworthy. There is, and should be, a hesitation to so license Mr. Carr. It would be taking a chance on someone who has proven in the past not to be trustworthy. However, to some degree every applicant is unknown, and every license is a chance taken.

Although the legislature has provided the exception referred to earlier in sec. 111.335, Wis. Stats., useful guidance in finding the proper balance may be found in the express legislative purpose of the Fair Employment Act (chapter 111, subchapter II, Wis. Stats.):

²State v. Kelly, 39 Wis.2d 171, 158 N.W.2d 554 (1968), State v. MacIntyre, 41 Wis.2d 481, 164 N.W.2d 235 (1969), State v. Corry, 51 Wis.2d 124, 186 N.W.2d 325 (1970), and State v. Aldrich, 71 Wis.2d 206, 237 N.W.2d 689 (1976).

111.31 Declaration of policy. (1) The legislature finds that the practice of unfair discrimination in employment against properly qualified individuals by reason of ... conviction record (and numerous other bases) ... substantially and adversely affects the general welfare of the state. Employers ... and licensing agencies which deny employment opportunities and discriminate in employment against properly qualified individuals solely because of their ... conviction record ... deprive those individuals of the earnings which are necessary to maintain a just and decent standard of living.

(2) ... It is the intent of the legislature in promulgating this subchapter to encourage employers to evaluate an employee or applicant for employment based upon the employee's or applicant's individual qualifications rather than upon a particular class to which the individual may belong.

(3) In the interpretation and application of this subchapter, and otherwise, it is declared to be the public policy of the state to encourage and foster to the fullest extent practicable the employment of all properly qualified individuals regardless of ... conviction record This subchapter shall be liberally construed for the accomplishment of this purpose.

Every applicant will have strengths and weaknesses, and Mr. Carr's are now better known to the Department than are those of most applicants. There is no question that in the past he committed acts which deserve condemnation and punishment, and which, as stated above, form a sufficient basis for the Department to deny his application. However, the evidence presented in the hearing leads me to the conclusion that Mr. Carr has been (and continues to be) appropriately punished for his acts, and that he is stronger and wiser for his experience. The testimony of his two witnesses, especially Janet Weber, convinces me that this is a chance worth taking. On balance, and for all the above reasons, I recommend that the Department grant Mr. Carr's request for a real estate salesperson's license, with limitations.

My recommendation for a limited license would be easier to make if a limitation could be imposed to require that Mr. Carr be supervised whenever he views or shows a house, or whenever he contacts an individual. Unfortunately, Mr. Sager testified that such a limitation would severely hamper his effectiveness as a salesperson. Without the ability to impose such a limitation, the decision is more difficult. However, Mr. Carr's probation runs through May of 1995, and because the Department of Corrections apparently has a policy of not releasing sex offenders early, he will most likely be supervised by an agent for approximately three more years. This actually provides an opportunity for reasonably close supervision of his activities for a significant period, which Ms. Weber indicated a willingness to do, and it means that the public might be better protected by granting Mr. Carr a license now rather than waiting until he has

completed his probation. All in all, a proper balancing of the public's interest, the profession's interest, and Mr. Carr's interest leads to the recommendation that the Department in its discretion should grant Mr. Carr a license with limitations as described in the proposed order.

Dated July 20, 1992.


John N. Schweitzer
Administrative Law Judge
Department of Regulation and Licensing

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